

Exhibit “5”



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

BRAD N. MANSKER,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY OF
WASHINGTON,

Defendant.

No. 11-2-06668-7

**ORDER GRANTING PLAINTIFF'S
MOTION FOR CLASS CERTIFICATION**

The Honorable SUSAN K. SERKO

Hearing Date: March 7, 2014

BEFORE THE COURT IS Plaintiff's Motion for Class Certification which seeks
certification of the following class under CR 23(b)(3):

All Farmers insureds in the State of Washington who (from and
after March 25, 2004) were paid under the uninsured/underinsured
motorist (UIM) provisions of their Farmers policy or had UIM
motorist property damage coverage and were involved in an
accident with an underinsured/uninsured motorist or hit-and-run
motorist, and who were not compensated for diminished value,
where:

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- a. the estimate, including supplements, to repair the vehicle was more than \$1,000;
- b. the vehicle suffered structural (frame) damage and/or required body or paint work; and
- c. the vehicle was less than six years old (model year plus five) and had less than 90,000 miles on it at the time of the accident. The proposed class does not include Defendants or their officers or directors; this Court or any member of the Court's immediate family; or persons whose insured vehicles were leased.

The Parties' Claims

The record shows that Plaintiff was in an accident in Tacoma, Washington on February 24, 2007 in which his 2006 Honda Ridgeline sustained irreparable frame, body panel, paint and other damage as determined by the arbitration award dated September 14, 2012. Plaintiff filed a claim under the uninsured motorist provisions of his Farmers automobile insurance policy, and Farmers subsequently paid for repairs to his vehicle.

After his vehicle was repaired, Plaintiff made a claim for the diminished value ("DV") sustained by his vehicle as a result of the accident. Plaintiff sought coverage for the diminished value resulting from the accident damage that persisted even after repair. Farmers Insurance Company of Washington denied this claim for diminished value.

The Washington Supreme Court, in *Moeller v. Farmers Insurance Company of Washington*, 173 Wn.2d 264, 267 P.3d 998 (2011), determined that diminished value is recoverable, stating that "a vehicle suffers 'diminished value' when it sustains physical damage in an accident but due to the nature of the damage, it cannot be fully restored to preloss condition."

The record reveals that there is no express exclusion for diminished value in Farmers' uninsured motorist insurance policies. Plaintiff alleges that despite the lack of any exclusion for

1 diminished value in its insurance contract, Farmers' common class-wide practice is not to inform
2 its insureds of a diminished value loss or to provide estimates of damages that include payment
3 for diminished value.

4
5 Plaintiff contends that the requirements of Washington Superior Court Civil Rule 23 have
6 been met. Defendants contend, among other arguments, that Plaintiff has failed to meet his
7 burden to show a cohesive class with predominating common issues and a damages model to
8 quantify the diminished value losses of the Class. As discussed below, the Court has carefully
9 considered, and now rejects, each of the Defendant's arguments.

10 ***Class Certification Standard***

11 The Court's ruling is governed by CR 23. A class action is a specialized proceeding and
12 in general must be brought and maintained in strict conformity with the requirements of CR 23.
13 Class certification should be granted only after rigorous analysis, to ensure the prerequisites of
14 CR 23 have been satisfied. In rendering its decision the Court is not to consider the merits of the
15 Plaintiff's case, or the possibility of eventual success at trial in making a determination of
16 whether a class should be certified. However, the Court may look, and did look, beyond the
17 pleadings and make a preliminary inquiry into the merits of the action so as to obtain an
18 understanding of the claims, defenses, relevant facts, and application of substantive law to
19 determine if class treatment is appropriate. See *State v. Oda*, 111 Wn.App. 79, 44 P.3d 8 (2002).
20
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22 In reaching its decision and findings the Court thoroughly examined the record developed
23 by the parties. Prior to the hearing on class certification, the Court considered, amongst other
24 submissions: Plaintiff's Motion for Class Certification and Reply; Defendants' Brief in
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1 Opposition to Plaintiff's Motion; and, the substantial number of exhibits and deposition excerpts
2 offered in support of the parties' briefing.

3 The parties' comprehensive and complete discussion of the class certification issues, and
4 their efforts to address the Court's questions, allowed the Court an ample opportunity to become
5 familiar with the claims, potential defenses, relevant facts, management of the case as a class
6 action, application of substantive law to the relevant facts, and some of the potential witnesses
7 and their qualifications.
8

9 Class certification requires that all four requirements of CR 23(a), numerosity,
10 commonality, typicality, and adequacy be satisfied along with at least one of the three sections of
11 CR 23(b). The party proposing certification bears the burden of proving each element of the
12 certification requirements. Each will be considered in turn.
13

14 **CR 23(a) REQUIREMENTS**

15 *Numerosity*

16 Based upon the record before it, the Court finds that the numerosity requirement is
17 certainly met because there may be as many as 7,000 class members. Absent certification,
18 joinder is impracticable. The value of each potential plaintiff's claim is sufficiently low to deter
19 many, if not most, of the potential class members from pursuing individual claims. Litigation of
20 multiple separate claims by even a fraction of the plaintiff class members would impose hardship
21 on the litigants and the Court. There can be no serious dispute that the numerosity requirement is
22 satisfied.
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1 ***Commonality***

2 The Court finds that there are issues of law and fact common to the class, including
 3 whether each class member's vehicle suffered reduction in value as a result of the vehicle having
 4 been in an accident; whether each class member's vehicle could be returned to pre-accident
 5 condition; and, whether Farmers' through its business practices engaged in a common and
 6 systematic course of conduct designed to avoid acknowledging or paying DV. All members of the
 7 proposed class suffer from the same allegedly wrongful conduct by Farmers in the interpretation
 8 of the policy language and in its common course of conduct directed at each class member
 9 through its uniform corporate claims adjusting policies and practices.
 10

11 The Court has considered Defendant's argument that the Washington Supreme Court, in
 12 *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264 (2011) would have somehow reached
 13 a different conclusion in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011).
 14 The Court declines to accept this argument as *Dukes* was decided no less than 9 months prior to
 15 the decision in *Moeller*. Similarly, Judge Arend's decision in *Scammell v. Farmers* was decided in
 16 2009, a year prior to Division II's *Moeller* decision, which described types of "tangible" damage
 17 which cannot be repaired. Here, Plaintiff offered myriad types of evidence showing he can prove,
 18 using classwide proof, that vehicles suffered irreparable damage of the type the *Moeller* Courts
 19 found warrant recovery of DV loss. For example, Farmers' corporate designees admitted that
 20 vehicles suffering the types of damages described in the class definition are tangibly different,
 21 (see Exhibits "H" and "I" to Plaintiff's Reply Declaration). Additionally, Judge Finkle's
 22 Arbitration Award described the effects of weakened sheet metal (see Award at para's 18 - 23) as
 23 described by Dr. Wood in his declaration and deposition. And, Plaintiff's reply exhibits such as
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1 the "before and after" photographs of the Janhunan vehicle and the Wood deposition excerpts
 2 show how secondary damage affects a vehicle post-repair. The previous cases certifying classes
 3 on these issues have all included damages requiring frame, paint and body (sheet metal) repairs.¹

4 Farmers' attack on Plaintiff's damage model under *Comcast Corp. v. Behrend*, 133 S. Ct.
 5 1426 (2013) is also misplaced. Initially, despite Farmers' arguments to the contrary, as recently
 6 observed by the most recent case construing the impact of Comcast, that case does not require any
 7 different analysis of the issues in this case:

8
 9 The Supreme Court emphasized that its decision in Comcast "turns on the
 10 straightforward application of class-certification principles." 133 S. Ct. at 1433.
 11 Likewise, the dissenters in *Comcast* opined that the majority opinion "breaks no
 12 new ground on the standard for certifying a class action under Federal Rule of
 13 Civil Procedure 23(b)(3)." 133 S. Ct. at 1436 (Ginsburg and Breyer, JJ.,
 14 dissenting). Indeed, the dissenters asserted that "[t]he Court's ruling is good for
 15 this day and case only," in light of the "oddity" that the plaintiffs "never
 16 challenged" the "need to prove damages on a classwide basis through a common
 17 methodology," despite the "well nigh universal" recognition in the case law and
 18 class action treatises that "individual damages calculations do not preclude class
 19 certification under Rule 23(b)(3)." 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ.,
 20 dissenting).

21 *Cason-Merenda v. VHS of Michigan, Inc.*, No. 06-15601 (March 7, 2014 E.D.Mich.). Here,
 22 Farmers cites several cases, including *Comcast* and *Dukes* to argue that statistical proof should
 23 not be permitted to prove classwide damages. But, those cases do not change this Court's
 24 analysis. There, the Courts found the proof did not prove "common impact" in anti-trust and
 25 discrimination actions, but they did not hold that statistical proof could not prove classwide
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¹ Indeed, nearly identical classes, based on similar, if not the same, evidence have previously been certified in this state as class actions for litigation and settlement purposes. See *Busani v. USAA*, Pierce County Superior Court Cause No. 99-2-08217-1; *Laughlin v. Allstate et al.*, Pierce County Superior Court Cause No. 02-2-10380-0; *Rose v. Nationwide Insurance et al.*, Pierce County Superior Court Cause No. 02-2-06621-1; *Shin v. Esurance*, United States District Court, Western District of Washington, Case No. 08-CV-05626-RBL; *Martin v. Hartford Insurance Co. et al.*, United States District Court, Western District of Washington, Case No. 08-CV-3651-RJB; and *Moeller v. Farmers Insurance et al.*, Pierce County Superior Court Cause No. 99-2-07850-6.

1 damages under other circumstances. Here, it is plain that the Siskin model measures the
2 “damages resulting from the particular ... injury on which liability in this action is premised,”
3 *Comcast*, 133 S. Ct. at 1433. The model tracks the loss of value attributable through a recognized
4 methodology – regression analysis – to the very types of damage described in the class definition
5 and for which Plaintiff offers classwide proof. Despite Farmers assertions to the contrary, the
6 Court finds Dr. Siskin repeatedly testified both in his deposition and the two declarations before
7 this Court that the damages that are quantified in the auction study were from identifiable areas of
8 damage, or DV, and not an intangible taint or stigma.

10 *Typicality*

11 Mr. Mansker challenges the way Farmers handles claims for property damage and the
12 alleged fact that Farmers fails to pay diminished value once a car has been in an accident under an
13 uninsured motorist claim. Mr. Mansker's car was in an accident, and it suffered the identical
14 types of damage applicable to all class members' vehicles. He received payment under his
15 uninsured motorist coverage for damages to his 2006 Honda Ridgeline within the class period,
16 and did not receive payment for diminished value. The Court finds that Mr. Mansker's claims are
17 typical.

19 *Adequacy*

20 The Court further finds that Mr. Mansker will fairly and adequately protect the interests of
21 the class. Mr. Mansker has no conflicts with their interests. He submitted his claim to a forced
22 arbitration and prevailed. Even though it does not appear to be disputed that Plaintiff's counsel
23 would be adequate, in addition to Mr. Mansker's qualifications, the Court carefully scrutinized
24 Plaintiff's counsel. The Court has independently considered the quality and experience of the
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1 proposed class counsel that have appeared before it. Taking into consideration its own experience
2 with Plaintiff's Counsel over the course of the case, including the quality of their briefing and
3 argument on the law and the facts, the Court finds that they are knowledgeable and experienced in
4 this type of litigation.

5 The elements of CR 23(a) have been satisfied.

6
7 ***CR 23(b) REQUIREMENTS***

8 Plaintiffs have requested certification under CR 23(b)(3) as to damages². The Court
9 previously granted Farmers' motion for partial summary judgment as to Mr. Mansker's claim for
10 declaratory and injunctive relief.

11 In determining whether the prerequisites of CR 23(b)(3) are met, this Court is directed to
12 determine whether common questions of fact or law predominate over questions affecting only
13 individual members and whether a class action is superior to other available methods for the fair
14 and efficient adjudication of the controversy. The following factors are pertinent to the Court's
15 consideration of these two important issues: the interest of members of the class in individually
16 controlling the prosecution or defense of separate actions; the extent and nature of any litigation
17 already commenced by or against a member of the class; the desirability or undesirability of
18 concentrating litigation in a particular forum; and the difficulty likely to be encountered in
19 management of the proposed class action. After carefully considering each factor the Court finds
20 as follows:
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23 Since this case involves a common course of conduct exhibited by Farmers in adjusting
24 the uninsured motorist claims of the class members, it is particularly appropriate to use the class

25 ² The Court previously ruled that Mr. Mansker may not pursue his claims for declaratory and injunctive
26 relief when it granted Defendant's motion for partial summary judgment as to those claims. Accordingly,
Plaintiff limited his request for certification.

1 action procedure. Under nearly identical circumstances, the Division II Court of Appeals in
2 Moeller found predominance where the "class members shared the same insurance policy,
3 potentially suffered damage, and were allegedly harmed by Farmers' course of conduct." *Moeller*
4 *v. Farmers*, 155 Wn. App. 133, 150, 229 P.3d 857 (2010). Additional predominating questions
5 include whether Farmers breached its contracts in not informing insureds or adjusting claims to
6 include DV, and how the amount of DV is to be determined.
7

8 Plaintiffs argue that the best way to present their case (and for the Court to determine
9 whether diminished value can and will be shown for class members) is to use common class-wide
10 evidence. Such evidence includes the testimony of their subject matter experts in auto damage
11 and repair and the damage model developed by their expert, Dr. Siskin, based on information
12 gathered at auto auctions and from Defendant's own files. Moreover, no other potential class
13 members have come forward to advise the Court that they have an interest in pursuing or
14 controlling the prosecution of separate actions on their own behalf. Indeed, Plaintiffs contend
15 that few affected class members are even aware of the availability of diminished value coverage
16 due to the success of Farmers' corporate policy of non-disclosure.
17

18 Regarding the second factor, the Court is not aware of any other litigation already
19 commenced by or against a member of the proposed class. Thus, concentrating the litigation in
20 this forum will not impede other actions. Indeed, it will foster uniform adjudication of all claims.
21 As to the third factor, this case is limited to Farmers insureds in the State of Washington during
22 the relevant period with claims within the class definition. The desirability of having this case in
23 Superior Court as opposed to any other forum, including individual arbitration, is readily
24 apparent. Indeed, Plaintiff challenges Farmers' ability to compel arbitration at all, which would
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1 then mean a multitude of individual suits. The class action procedure is the only cost-effective
2 available means to determine this action.

3 The final factor is the difficulty likely to be encountered in management of the class action
4 as proposed, has been heavily disputed. The Court has regarded the manageability of this case as
5 a significant factor in reaching its decision. Here, the only conceivable method to adjudicate or
6 resolve this case is through a class action, as the de minimis size of individual claims would leave
7 policyholders without practical recourse, absent class treatment, to address the common legal and
8 factual issues.
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10 Plaintiffs have presented the Court with a preliminary plan of how to manage this
11 litigation as a class action. Their plan evidences a keen understanding of the steps necessary to
12 process claims, identify class members, analyze the data on the existence or amount of
13 diminished value, and then provide for notification and allocation of any damages awarded to the
14 class after trial. Plaintiff's counsel have exhibited an understanding of the sources of data, cross
15 checks on that data, supplemental sources of data, and the use of computers to index and
16 manipulate that data. This will expedite the retrieval, sorting, and analysis of pertinent data for
17 both the Plaintiffs and Defendants.
18

19 This Court has gained considerable insight into the case and now understands how this
20 case will proceed as a class action, what management it will require, and whether it can be
21 accommodated by this Court. These were vitally important matters for the Court to comprehend
22 in making a determination about whether a class action is a superior manageable way to address
23 this case. This is the central and key issue as far as the Court is concerned: whether the proposed
24 class action is practical, feasible, appropriate, and superior to litigate the concerns of both parties.
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1 Considerations which entered into the Court's decision were articulated above, as well as the
 2 economy of time for both the Court and the litigants, economy of expense for all concerned, and
 3 whether a class action would promote a uniformity of decisions to accomplish equity and justice
 4 for all involved.

5
 6 After carefully and closely considering all of these factors, my decision is that a class
 7 action is a superior means for policyholders to pursue any claims they may have for diminished
 8 value against Farmers.

9 The class members are numerous, with allegedly small claims for diminished value,
 10 impractical for other means of fair and uniform resolution. Farmers and its insureds need clarity
 11 on this issue, which can only be achieved with efficiency and finality through a class action, with
 12 its economy of time, effort, and expense.

13
 14 The Court therefore certifies the following class:

15 All Farmers insureds in the State of Washington who (from and after March 25,
 16 2004) were paid under the uninsured/underinsured motorist (UIM) provisions of
 17 their Farmers policy or had UIM motorist property damage coverage and were
 involved in an accident with an underinsured/uninsured motorist or hit-and-run
 motorist, and who were not compensated for diminished value, where:


- 18 a. the estimate, including supplements, to repair the vehicle was more than
 19 \$1,000;
- 20 b. the vehicle suffered structural (frame) damage and/or required body or
 21 paint work; and
- 22 c. the vehicle was less than six years old (model year plus five) and had less
 23 than 90,000 miles on it at the time of the accident.

24 BRAD N. MANSKER is appointed as Class Representative and STEPHEN M. HANSEN,
 25 of the Law Offices of STEPHEN M. HANSEN, P.S., VAN BUNCH of BONNETT,
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1 FAIRBOURN, FRIEDMAN and BALINT, P.C. and DAVID A. FUTSCHER of FUTSCHER
2 LAW, PLLC, are appointed as Class Counsel.

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4 BASED UPON the above, IT IS SO ORDERED.

5 DATED this 26 day of March, 2014.

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9 SUSAN K. SERKO
SUPERIOR COURT JUDGE

10 Presented by:

11 The Law Offices of STEPHEN M. HANSEN, P.S.

12
13
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cc: Stephen Hansen } Mailed 3/26/14
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